



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

999 18TH STREET - SUITE 500

DENVER, CO 80202-2466

<http://www.epa.gov/region08>

July 19, 2006

Ref: 8ENF-L

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

Ordean "Lars" Nygren
General Manager
Capital Electric Cooperative
4111 State Street North
Bismarck, ND 58502

Re: Complaint and Notice of
Opportunity for Hearing,
Docket No. **TSCA-08-2006-0003**

Dear Mr. Nygren:

Enclosed is an administrative complaint seeking penalties for violation by Capital Electric Cooperative ("Respondent") of certain requirements under the Toxic Substances Control Act ("TSCA") and its implementing regulations.

Complaint and Notice of Opportunity for Hearing

Respondent is hereby served with a Complaint and Notice of Opportunity for Hearing (referred to as the "Complaint") issued under the authority of Section 16(a) of TSCA, 15 U.S.C. Section 2615(a). Enclosed with this Complaint are the Consolidated Rules of Practice, EPA's Polychlorinated Biphenyls (PCB) Penalty Policy, Penalty Calculation Justification, and PCB Civil Penalty Calculation Worksheet, which are referenced in the Complaint.

The U.S. Environmental Protection Agency ("EPA") alleges in the Complaint that Respondent failed to comply with Section 15 of TSCA, 15 U.S.C. Section 2614, by violating TSCA's implementing regulations set forth at 40 C.F.R. Part 761.30(a)(1)(vi)(A), (a)(1)(ix), and (a)(1)(xii). These requirements require: (1) registry of PCB Transformers with EPA; (2) visual inspection of PCB Transformers at least once every three months; (3) maintenance of records of inspection and maintenance history for PCB Transformers.



Printed on Recycled Paper

By law, the Respondent has the right to request a hearing regarding the matters set forth in this Complaint. The Respondent is encouraged to pay particular attention to the part of the Complaint entitled "Opportunity to Request a Hearing." If the Respondent does not respond to this Complaint within thirty (30) days of receipt, a Default Judgment may be entered and the proposed civil penalty may be assessed without further proceedings. In its Answer, the Respondent may request a hearing. It has the right to be represented by an attorney at any stage of these proceedings.

Whether or not the Respondent requests a hearing, it may confer informally with EPA concerning the alleged violations or the amount of the proposed civil penalty. The Respondent may wish to be represented by counsel during any settlement conference. EPA encourages all parties against whom it files a complaint such as this to pursue the possibility of settlement. Any such settlement shall be memorialized in a written Consent Agreement, followed by the issuance of a Final Order by the Regional Judicial Officer, U.S. EPA-Region 8. The signature of a representative of the Respondent on a Consent Agreement shall constitute a waiver of the Respondent's right to request a hearing on any matter to which it has stipulated in the Consent Agreement.

A request for an informal conference does not extend the thirty-day period during which the Respondent must submit its written Answer and request for hearing. The informal conference procedure may be pursued simultaneously with the adjudicatory hearing.

EPA Contact

If the Respondent has any legal questions or would like to discuss the possibility of settlement, please contact:

Jessie Goldfarb (8ENF-L)
Senior Enforcement Attorney
U.S. EPA-Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466
(303) 312-6926.

EPA has agreed to notify small businesses of their right to comment on regulatory enforcement activities at the time of an Agency enforcement activity pursuant to the Small Business Regulatory Enforcement and Fairness Act ("SBREFA"). SBREFA does not eliminate responsibility to comply with TSCA, nor does it create any new rights or defenses under law. A SBREFA information sheet containing further information on compliance assistance resources and tools available to small businesses is enclosed with this letter.

EPA urges Respondent's prompt attention to these matters.

Sincerely,

SIGNED

Martin Hestmark, Director
Technical Enforcement Program
Office of Enforcement, Compliance,
and Environmental Justice

SIGNED

David J. Janik,
Supervisory Enforcement Attorney
Office of Enforcement, Compliance,
and Environmental Justice

Enclosures:

1. Complaint and Notice of Opportunity for Hearing
2. Consolidated Rules of Practice
3. EPA's Polychlorinated Biphenyl (PCB) Penalty Policy
4. Penalty Calculation Justification
5. PCB Civil Penalty Calculation Worksheet
6. SBREFA Information Sheet

cc w/ Enclosure 1:

Kim Le, 8ENF-AT
Jessie Goldfarb, 8ENF-L

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

IN THE MATTER OF:)	
)	DOCKET NO.TSCA-08-2006-0003
CAPITAL ELECTRIC COOPERATIVE)	
4111 STATE STREET)	COMPLAINT AND NOTICE OF
BISMARCK, ND 58502,)	OPPORTUNITY FOR HEARING
)	
Respondent.)	

STATUTORY AUTHORITY

This civil administrative Complaint and Notice of Opportunity for Hearing (referred to as the "Complaint") is issued pursuant to Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. Section 2615(a). United States Environmental Protection Agency ("EPA") regulations governing polychlorinated biphenyls ("PCBs") are set forth at 40 C.F.R. Part 761. Violations of these regulations constitute violations of Section 15 of TSCA, 15 U.S.C. Section 2614. This proceeding is subject to EPA's "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Consolidated Rules of Practice"), 40 C.F.R. Part 22, a copy of which is enclosed. The undersigned EPA officials have been properly delegated the authority to issue this Complaint and Notice of Opportunity for Hearing ("Complaint"). EPA alleges that Respondent has violated Section 15 of TSCA, 15 U.S.C. Section 2614, and proposes the assessment of a civil penalty as more fully explained below.

GENERAL ALLEGATIONS

_____The following general allegations apply to and are incorporated by reference into each of the Counts of this Complaint:

1. EPA has jurisdiction of this matter under Section 16 of TSCA, 15 U.S.C. Section 2615.

2. Respondent is Capital Electric Cooperative ("Respondent").

3. At all times relevant to this action, Respondent was a corporation organized under the State of North Dakota.

4. At all times relevant to this action, Respondent was a "person" as defined by 40 C.F.R. Section 761.3, and thus subject to regulation.

5. At all times relevant to this action, Respondent was the owner and operator of a facility located at 4111 State Street, Bismarck, North Dakota (the "facility").

6. On or about August 4, 2005, Kim Le, and authorized inspector for EPA ("Inspector"), conducted an inspection of Respondent's facility with the consent of a representative of Respondent, Larry Wittmayer, System Supervisor, to determine compliance with TSCA and its implementing regulations.

7. At the beginning of the inspection referenced in Paragraph 6, above, the Inspector issued notices of inspection and confidentiality to Mr. Wittmayer. Mr. Wittmayer accompanied the Inspector during the inspection.

8. During the inspection referenced in Paragraph 6, above, the Inspector obtained documentation from Respondent describing General Electric PCB Transformer, Serial Number 8947746, which

contained 1195 ppm of PCBs, with a test date of September 18, 2002 and an out-of-service date of April 9, 2003.

9. At the time of the Inspection referenced in Paragraph 6, above, Respondent had not previously registered with EPA PCB Transformers located at the same address as the PCB Transformer referenced in Paragraph 8, above.

10. On March 1, 2006, in response to the Inspector's telephone request, Mr. Wittmayer faxed the Inspector a Transformer Record showing that Respondent took possession of the PCB Transformer referenced in Paragraph 8, above, on October 5, 1948.

11. The PCB Transformer referenced in Paragraph 8, above, was in use at Respondent's facility from September 18, 2002 through April 9, 2003.

STATUTORY AND REGULATORY FRAMEWORK

_____The following items apply to and are incorporated by reference into each of the Counts of this Complaint:

12. 40 C.F.R. Section 761.3 defines "PCBs" as "any chemical substance that is limited to the biphenyl molecule that has been chlorinated to varying degrees or any combination of substances which contains such substance."

13. 40 C.F.R. Section 761.3 defines "PCB Transformer" as any transformer that contains 500 ppm PCBs or more.

14. 40 C.F.R. Sections 761.20-761.30 prohibit the use of "PCB Transformers", as defined in 40 C.F.R. Section 761.3, except as authorized by the regulations.

15. 40 C.F.R. Section 761.30(a)(1)(vi)(A) requires that no later

than December 28, 1998, all owners of PCB Transformers register their transformers with the Environmental Protection Agency, National Program Chemicals Division, Office of Pollution Prevention and Toxics (7404), 1200 Pennsylvania Avenue, NW, Washington, DC 20460.

16. 40 C.F.R. Section 761.30(a)(1)(ix) requires that a visual inspection of each PCB Transformer in use be performed at least once every three months.

17. 40 C.F.R. Section 761.30(a)(1)(xii) requires that records of inspection and maintenance history be maintained at least 3 years after disposing of the transformer and be made available for inspection, upon request by EPA. Such records shall contain the information enumerated in 40 C.F.R. Section 761.30(a)(1)(xii)(A)-(J) for each PCB Transformer.

DESCRIPTION OF VIOLATIONS

COUNT 1

18. During the inspection referenced in Paragraph 6, above, Respondent failed to provide the Inspector with documentation evidencing Respondent's registration of the PCB Transformer referenced in Paragraph 8, above, with the Environmental Protection Agency, National Program Chemicals Division, Office of Pollution Prevention and Toxics (7404), 1200 Pennsylvania Avenue, NW, Washington, DC 20460 ("EPA Headquarters").

19. During the inspection referenced in Paragraph 6, above, Mr. Wittmayer admitted to the Inspector that he had not registered the PCB Transformer referenced in Paragraph 8, above, with EPA Headquarters.

20. Respondent's failure to register the PCB Transformer referenced in Paragraph 8, above, with EPA Headquarters, as required by 40 C.F.R. Section 761.30(a)(1)(vi)(A), constitutes a violation of Section 15 of TSCA, 15 U.S.C. Section 2614.

COUNT 2

21. Paragraph 18, above, is incorporated by reference into this Count.

22. During the inspection referenced in Paragraph 6, above, Mr. Wittmayer admitted to the Inspector that he had not maintained records containing information relative to the registration of the PCB Transformer referenced in Paragraph 8, above, with EPA Headquarters.

23. Respondent's failure to maintain records of inspection and maintenance history containing the information enumerated in 40 C.F.R. Section 761.30(a)(1)(xii)(I) for the PCB Transformer referenced in Paragraph 8, above, at least 3 years after disposing of that PCB Transformer, as required by 40 C.F.R. Section 761.30(a)(1)(xii), is a violation of Section 15 of TSCA, 15 U.S.C. Section 2614.

COUNT 3

24. During the inspection referenced in Paragraph 6, above, Respondent failed to provide the Inspector with documentation evidencing Respondent's performance of a visual inspection of the PCB Transformer referenced in Paragraph 8, above, at least once during the September 18, 2002 through December 18, 2002 time frame.

25. During the inspection referenced in Paragraph 6, above, Mr. Wittmayer admitted to the Inspector that Respondent had not performed any visual inspection of the PCB Transformer referenced in Paragraph 8, above.

26. Respondent's failure to perform a visual inspection of the PCB Transformer referenced in Paragraph 8, above, at least once every three months, as required by 40 C.F.R. Section 761.30(a)(1)(ix), constitutes a violation of Section 15 of TSCA, 15 U.S.C. Section 2614.

COUNT 4

27. During the inspection referenced in Paragraph 6, above, Respondent failed to provide the Inspector with documentation evidencing Respondent's performance of a visual inspection of the PCB Transformer referenced in Paragraph 8, above, at least once during the December 18, 2002 through March 18, 2003 time frame.

28. Paragraph 25, above, is incorporated by reference into this Count.

29. Respondent's failure to perform a visual inspection of the PCB Transformer referenced in Paragraph 8, above, at least once every three months, as required by 40 C.F.R. Section 761.30(a)(1)(ix), constitutes a violation of Section 15 of TSCA, 15 U.S.C. Section 2614.

COUNT 5

30. Paragraphs 24 and 27, above, are incorporated by reference into this Count.

31. During the inspection referenced in Paragraph 6, above, Mr. Wittmayer admitted to the Inspector that he had not maintained records containing information relative to the visual inspection of the PCB Transformer referenced in Paragraph 8, above.

32. Respondent's failure to maintain records of inspection and maintenance history containing the information enumerated in 40

C.F.R. Section 761.30(a)(1)(xii)(B)-(H) for the PCB Transformer referenced in Paragraph 8, above, at least 3 years after disposing of that PCB Transformer, as required by 40 C.F.R. Section 761.30(a)(1)(xii), is a violation of Section 15 of TSCA, 15 U.S.C. Section 2614.

PROPOSED CIVIL PENALTY

The proposed civil penalty has been determined in accordance with Section 16(a) of TSCA, 15 U.S.C. Section 2615(a). Section 16(a) of TSCA, 15 U.S.C. Section 2615(a), and 40 C.F.R. Part 19 authorize the assessment of a civil penalty of up to \$32,500 per day of violation for each violation of TSCA or its implementing regulations occurring after March 15, 2004. For purposes of determining the amount of any civil penalty to be assessed, Section 16(a)(1)(B), 15 U.S.C. 2615(a)(1)(B), requires EPA to take into account, in addition to such other factors as justice may require, the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, and the degree of culpability.

To develop the proposed penalty in this Complaint, Complainant has taken into account the particular facts and circumstances of this case with specific reference to EPA's Polychlorinated Biphenyls (PCB) Penalty Policy, dated April 9, 1990 (the "Penalty Policy"). This policy provides a rational, consistent and equitable calculation methodology for applying the statutory factors enumerated above to particular cases.

Based upon the facts alleged in this Complaint and upon the statutory factors enumerated above, as known to Complainant at this time, Complainant proposes that Respondent be assessed a penalty of **\$12,000** for the violations alleged in this Complaint. The Penalty Policy, Penalty Calculation Justification, and PCB Civil Penalty Calculation Worksheet are enclosed with this Complaint and incorporated herein.

The Administrative Law Judge is not bound by EPA's Penalty Policy or the penalty proposed by Complainant, and may assess a penalty above the proposed amount, up to the maximum amount authorized by statute.

Payment of the penalty may be made by cashier's or certified check, payable to the "Treasurer, United States of America" and mailed to:

Regular Mail:

U.S. EPA-Region 8
Regional Hearing Clerk
Mellon Bank
Lockbox 360859
Pittsburgh, PA 15251-6859, or

Federal Express, Airborne, or other commercial carrier:

U.S. EPA-Region 8, 360859
Mellon Client Service Center, Room 154-0670
500 Ross Street
Pittsburgh, PA 15251-6959.

A copy of the check must be sent to the Regional Hearing Clerk and also to Jessie Goldfarb, Senior Enforcement Attorney, at the addresses provided below.

OPPORTUNITY TO REQUEST A HEARING

As provided by Section 16(a)(2)(A) of TSCA, 15 U.S.C. Section

2615(a)(2)(A), Respondent has the right to request a hearing on the issues raised in this Complaint. In the event that Respondent intends to request a hearing to contest any material fact set forth in the Complaint, or contends that the amount of the proposed penalty is inappropriate, or contends that it is entitled to a judgment as a matter of law, Respondent must file a written Answer to this Complaint with the Regional Hearing Clerk at the following address:

Regional Hearing Clerk (8RC)
U.S. EPA-Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466

An Answer must be filed within thirty (30) days of receipt of the Complaint. The Answer must clearly and directly admit, deny, or explain each factual allegation of the Complaint with regard to which Respondent has any knowledge. The Answer must also state: (1) the circumstances or arguments which are alleged to constitute the grounds of defense; (2) the facts which Respondent intends to place at issue; and (3) whether a hearing is requested. Hearings will be conducted in accordance with the Consolidated Rules of Practice.

If Respondent fails to file an Answer with the Regional Hearing Clerk within thirty (30) days of receipt of the Complaint, such failure shall constitute an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing under Section 16(a)(2)(A) of TSCA, 15 U.S.C. Section 2615(a)(2)(A). The proposed penalty shall become due and payable by Respondent, without further proceedings, sixty (60) days after a final order is issued upon default.

QUICK RESOLUTION

Respondent may resolve this proceeding at any time by paying the specific penalty set forth in the Complaint. Such action to make payment need not contain any response to, or admission of, the allegations set forth in the Complaint. Such action to make payment constitutes a waiver of Respondent's right to contest the allegations and appeal the final order. See Section 22.18 of the Consolidated Rules of Practice for a full explanation of the quick resolution process.

SETTLEMENT NEGOTIATIONS

Whether or not Respondent requests a hearing, it may confer informally with EPA concerning the alleged violations or the amount of the proposed penalty. Respondent may wish to be represented by counsel at the informal conference. If a settlement is reached, it will be finalized by the issuance of a written Consent Agreement and Final Order by the Regional Judicial Officer, U.S. EPA-Region 8. To explore the possibility of settlement in this matter, contact:

Jessie Goldfarb (8ENF-L)
Senior Enforcement Attorney
U.S. EPA-Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466
(303) 312-6926.

Please note that a request for an informal settlement conference does not extend the thirty-day period for filing a written Answer and requesting a hearing.

**U.S. ENVIRONMENTAL PROTECTION AGENCY-
REGION 8, Complainant**

7/18/06

Date

SIGNED

Martin Hestmark, Director
Technical Enforcement Program
Office of Enforcement, Compliance, and
Environmental Justice

7/19/06

Date

SIGNED

David J. Janik
Supervisory Enforcement Attorney
Legal Enforcement Program
Office of Enforcement, Compliance, and
Environmental Justice

7/18/06

Date

SIGNED

Jessie Goldfarb
Senior Enforcement Attorney
Legal Enforcement Program
Office of Enforcement, Compliance, and
Environmental Justice

IN THE MATTER OF:
DOCKET NO.:

Capital Electric Cooperative
TSCA-08-2006-0003

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the attached COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING was hand-carried to the Regional Hearing Clerk, EPA-Region 8, 999 18th Street, Denver, Colorado, and that a true copy of the same was sent via Certified Mail: Return Receipt Requested to:

Ordean "Lars" Nygren
General Manager
Capital Electric Cooperative
4111 State Street North
Bismarck, ND 58502

7/19/06
Date

SIGNED
Judith McTernan

IF YOU WOULD LIKE TO COPIES OF THE ATTACHMENTS PLEASE CONTACT THE REGIONAL HEARING CLERK.

THIS DOCUMENT WAS FILED IN THE REGIONAL HEARING CLERK'S OFFICE ON JULY 19, 2006.